



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ton-Nah-Pa

2 IBIA 152 (01/28/ 1974)

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ESTATE OF TON-NAH-PA

(Navajo Allottee No. 011410, Deceased)

IBIA 73-20

Decided January 28, 1974

Petition to reopen.

Denied.

Indian Probate: Evidence: Generally

The findings of an examiner of inheritance will not be set aside when the findings are supported by substantial evidence adduced at a Probate Hearing.

Indian Probate: Reopening: Waiver of Time Limitation

Petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack

of diligence on the part of the petitioning party.

Indian Probate: Reopening: Waiver of Time Limitation

It is in the public interest to require Indian Probate proceedings to be concluded within some reasonable time in order that property rights of heirs and devisees in trust allotments be stabilized.

APPEARANCES: Mike Celestre, Esq., for petitioner, Voncelle, also known as Atad Yazzie or Mrs. Teddy Herman Victor.

OPINION BY MR. WILSON

This matter comes before the Board upon a petition for reopening of probate filed by Mike Celestre, Esq., for and in behalf of Voncelle, also known as Atad Yazzie or Mrs. Teddie Herman Victor, hereinafter referred to as petitioner, pursuant to 43 CFR 4.242.

The estate herein having been closed for more than three years the matter was properly referred to the Board of Indian Appeals by

Administrative Law Judge Richard B. Denu, in accordance with the provisions of 43 CFR 4.242(h).

The record indicates the decedent died in July of 1941 and that her estate was thereafter probated by the Department on January 15, 1944.

The petitioner in support of her petition to reopen alleges:

(1) That the petitioner had no notice of the hearing and as a result did not attend the hearing.

(2) That neither the petitioner's husband, Teddy Herman Victor, nor any other representative of hers attended the hearing in her behalf.

(3) That the examiner erred in awarding Hosten-Nez-Begay, a 1/4 share in the decedent's estate as the surviving husband and awarding him a further 1/4 share as father of Shorty-Nez-Begay, subsequently deceased son of the decedent.

(4) That the shares awarded to Hosten-Nez-Begay should have been awarded equally to the petitioner and her sister, Carrie Bah, or her heirs.

It is noted from the record that Administrative Law Judge Richard B. Denu, on July 5, 1972, denied a similar petition to reopen filed by the petitioner herein. No appeal was taken from the said denial. Ordinarily, failure to do so would be grounds for summary dismissal of any petition for reopening filed thereafter.

However, since the petition was filed more than three years after the final determination of heirs, the matter was outside

the jurisdiction of the Judge. As a result his decision of July 5, 1972, being of no force and effect, would not be fatal to the present petition. The decision of July 5, 1972, however, can be considered as a recommendation not to reopen insofar as the petition herein is concerned.

Allegations (1) and (2) are clearly refuted by the sworn testimony given by petitioner's husband, Teddy Herman Victor, to the Examiner of Inheritance, E. S. Stewart, on July 15, 1943, at Huerfano Store District, New Mexico. Pertinent part of the testimony is as follows:

Q. What relation, if any, was Ton-Nah Pa, deceased Navajo Allottee No. 011410, to you?

A. My mother-in-law. My wife had to go home, and asked me to take her place. (Emphasis supplied.)

The record furthermore contains a signed statement of petitioner's husband to the effect that he was notified of the July 15, 1943 hearing and that he appeared and was given an opportunity to submit evidence showing the right of his wife [the petitioner] to share in the estate.

From the foregoing, it is apparent that the petitioner was aware of the hearing even though she may not have actually been furnished a notice of the hearing. Failure to furnish her a copy of the notice is attributable to the fact that the petitioner was

erroneously considered a minor at the time of the hearing and for whom George Curley was duly appointed guardian ad litem. Petitioner, according to the record at the time of the hearing was 18 years of age and married and no longer a minor.

Petitioner's allegations set forth in the above item (3) and (4) insofar as Hosten-Nez-Begay's 1/4 share inherited direct from decedent are likewise without merit. The testimony given at the hearing by George Curley, Freddie Hasuse and petitioner's husband, Teddy Herman Victor, fully supports the examiner's decision of January 15, 1944, and we see no reason to disturb such findings.

Assuming, arguendo, that there was merit in the petitioner's allegations circumstances in the case at bar do not justify waiver of the three-year limitation applicable to reopening of estates.

Although the Secretary has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters, such power will be exercised only in cases where the most compelling reasons are present. Estate of Sophie Iron Beaver Fisherman, 2 IBIA 83, 80 I.D. 665 (1973); Estate of Charles Ellis, IA-1242 (April 14, 1966).

Furthermore, reopening of estates will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. Estate of Alvin Hudson, IA-P-17 (May 29, 1969); Estate of George Squawlie (Squally), IA-1231 (April 5, 1966); Estate of Sophie Iron Beaver Fisherman, *supra*.

In the first instance, petitioner in the case at bar has failed to come forth with any compelling proof to show that the long unusual delay of 29 years in not pursuing her remedy was not occasioned by the lack of diligence on her part. At the most she alleges generally without specification that attempts had been made to remedy the matter. This, of course, is insufficient and inadequate basis on which to infer diligence.

Secondly, the petitioner has failed to show a manifest injustice resulting from the decision of January 15, 1944.

Finally, it is in the public interest to require Indian Probate proceedings be concluded within some reasonable time in order to stabilize the property rights of heirs and devisees in trust property. Estate of Abel Gravelle, IA-75 (April 11, 1952). Accord, Estates of Jose Sandoval et al., IA-1337 (May 17, 1966).

In view of the foregoing reasons we find no justification for granting the petitioner's request to reopen the estate herein.

